Yusoff bin Kassim v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 59 OF 1987
ABDUL HAMID OMAR LP, PEH SWEE CHIN AND EDGAR JOSEPH JR SCJJ
18 APRIL 1992

Criminal Law *— Dangerous drugs — Trafficking — Evidence — Conflict of evidence on crucial factor — Conflicting evidence giving rise to more than reasonable doubt — Accused entitled to benefit of doubt — Case not proved with that certainty necessary to justify a verdict of guilty — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Procedure *— Appeal — Power and duty of appellate court — Failure of trial judge to observe inconsistencies or take account of material circumstances or probabilities — Liberty of appellate court to act upon its own view of conflicting evidence*

In this case the appellant appealed against his conviction on a charge of trafficking in 2,818g of cannabis found in a brown travelling bag carried by the appellant. In his defence the appellant had alleged that the brown bag belonged to another person whom he met at the customs check point and that he himself had carried a green travelling bag which contained nothing incriminating. The evidence of the appellant was corroborated by the evidence of one of the customs officers who admitted that there were two bags on that day. Another customs officer gave conflicting evidence that the appellant carried only the brown bag. The learned trial judge in his judgment did not mention the fact that the customs officer had admitted that the appellant was indeed carrying the two bags in question at the material time.

Held, allowing the appeal:

(1) The question whether or not the appellant was carrying the two bags or just the one bag was a crucial factor having regard to the defence case that he was an innocent carrier. The court could only assume from the omission of the trial judge (to mention the admission of the customs officer on the fact at issue) that the trial judge had failed to take into account, or give proper weight to, or draw proper inference from, the fact that the appellant might have carried the two bags at the material time.

(2) Upon an issue depending upon oral evidence where there is plainly perjury on one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. An appellate court can, in appropriate circumstances, act upon its own view of the conflicting evidence.

(3) In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given

proper weight to or drawn proper inferences from the matters adverted to, which otherwise might have caused him to come a different conclusion, the court was satisfied that he had not taken proper advantage of his having seen and heard the witnesses.

(4) In this case, the court was therefore at liberty to act upon its own view of the conflicting evidence and having done so, the court was amply satisfied that the case against the appellant was not proved with the certainty which is necessary in order to justify a verdict of guilty.

[Bahasa Malaysia summary

Di dalam kes ini perayu telah merayu terhadap sabitannya atas pertuduhan mengedar 2,818g kanabis yang dijumpai di dalam beg kembara berwarna coklat yang dibawa oleh perayu. Semasa membela dirinya perayu telah mengatakan bahawa beg coklat adalah kepunyaan seorang yang lain yang ditemuinya di tempat pemeriksaan kastam dan dia sendiri telah membawa beg berwarna hijau yang tidak mengandungi apa-apa yang menunjukkan dia bersalah. Keterangan perayu disokong oleh keterangan seorang pegawai kastam yang mengaku bahawa terdapat dua beg pada hari itu. Seorang pegawai kastam yang lain memberi keterangan bercanggah bahawa perayu telah membawa hanya beg coklat itu. Hakim yang arif di dalam penghakimannya tidak menyebut fakta yang pegawai kastam itu telah mengaku bahawa perayu sudah tentu membawa dua beg yang sedang dibincangkan pada masa itu.

Diputuskan, membenarkan rayuan itu:

(1) Persoalan sama ada atau tidak perayu membawa dua beg atau hanya satu beg adalah fakta penting mengambil berat terhadap kes pembelaan bahawa beliau adalah pembawa yang tidak bersalah beg itu. Mahkamah boleh hanya menganggap daripada peninggalan hakim perbicaraan (untuk menyebut pengakuan pegawai kastam akan fakta yang menjadi persoalan) bahawa hakim perbicaraan telah gagal mempertimbangkan, atau memberi kepentingan yang sewajarnya kepada, atau membuat inferens yang sewajarnya daripada, fakta yang perayu mungkin telah membawa dua beg pada masa itu.

(2) Atas isu yang bergantung kepada keterangan lisan di mana jelas terdapat sumpah bohong pada satu pihak atau pihak yang lain, Mahkamah Rayuan seharusnya amat dipengaruhi oleh pendapat hakim perbicaraan, yang telah mendengar saksi, kecuali di mana beliau telah gagal melihat butir yang tidak konsisten atau mempertimbangkan keadaan material atau kemungkinan. Suatu mahkamah rayuan boleh, dalam keadaan sesuai, bertindak atas pandangannya sendiri tentang keterangan bercanggah itu.

(3) Di dalam semua keadaan kes ini, dengan mengambil berat terhadap fakta bahawa hakim perbicaraan telah terlepas perhatian atau telah gagal mempertimbangkan atau memberi kepentingan yang sewajarnya kepada atau membuat inferens yang sewajarnya

daripada perkara yang dirujuk, yang kalau tidak mungkin akan menyebabkan beliau membuat kesimpulan yang lain, mahkamah berpuas hati bahawa beliau telah tidak mengambil kesempatan yang sewajarnya daripada peluangnya melihat dan mendengar saksi-saksi.

(4) Di dalam kes ini, mahkamah oleh kerana itu bebas bertindak atas pandangannya sendiri tentang keterangan yang bercanggah itu dan selepas berbuat demikian, mahkamah telah lebih dari cukup berpuas hati bahawa kes terhadap perayu tidak dibuktikan dengan kepastian yang perlu agar memberikan justifikasi bagi keputusan bersalah.]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 77–92. For cases on the power and duty of the appellate court, see 5 *Mallal's Digest* (4th Ed) paras 98–144.

Cases referred to

1 *Khoo Sit Hoh & Ors v Lim Thean Tong* [1912] AC 323 (refd)
2 *Coghlan v Cumberland* [1898] 1 Ch 704 (refd)
3 *Bigsby v Dickinson* (1876) 4 Ch D 24 (refd)
4 *Watt or Thomas v Thomas* [1947] AC 484; [1947] 1 All ER 582 (folld)
5 *R v Wallace* 23 Cr App R 32 (refd)
6 *Jubri v PP* [1962] MLJ 34 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a)

Appeal from: Criminal Trial No 15/1983 (High Court, Kangar)

Dato' Paramjit Singh and *Jula Singh* (*Paramjit & Co*) for the appellant.
Suriyadi Hashim (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): This appellant had been convicted in the High Court sitting at Kangar of a charge that he did on 2 July 1983, traffic on his own behalf, in a dangerous drug, to wit, 2,818g of cannabis, an offence in contravention of para (a) of sub-s (1) of s 39B of the Dangerous Drugs Act 1952 (Rev 1980) ('the Act') and sentenced to death, after a lengthy trial which ended on 27 August 1987. He now appeals against that conviction.

The whole of the material evidence has been carefully and critically examined before us and it is unnecessary to examine it again at any length. Suffice it to say, that the prosecution case, in broad outline, was that on the day concerned, at about 10.40 in the morning, a male Malay, coming from the direction of Pekan Siam, had arrived at the Customs Pedestrian Check Point in Padang Besar, on foot, carrying with him a travelling bag (exh P7),

described as brown in colour, which he placed on the customs counter. He was asked by Customs Officer Lim Soon Keat (PW7) to place the bag on the customs counter which he duly did. He was next asked by another Customs Officer, Hamzah bin Shafie (PW6), to unzip the bag, which he also duly did. In the bag, right on top, was a towel. When Hamzah attempted to examine the contents of the bag, the male Malay was alleged to have prevented him from doing so. He did this — to quote Hamzah — 'by pressing his hand on my hand'. At this point in time, according to Hamzah, he noticed just under the towel, in the bag, a brown coloured package, whereupon, the male Malay took to his heels, proceeding in the direction of Pekan Siam from whence he had come. Hamzah then pursued the male Malay, and after a very short chase, succeeded in apprehending him. That male Malay was the appellant.

The appellant was then brought to the office of the senior customs officer, where a thorough search of the bag was duly conducted in his presence, resulting in the recovery therefrom of, inter alia, three brown packages, each containing dried leaves, greenish in colour, later examined by the government chemist who certified that they contained cannabis, a dangerous drug within the meaning of the Act, weighing 2,818g. The appellant was then arrested and prosecuted upon the charge aforesaid.

Upon the facts outlined above, the learned trial judge had, quite correctly, ruled that the presumptions under s 37(d) and (da) of the Act arose, their combined effect being, that it was to be presumed, until the contrary was proved, that the appellant knew of the presence of the cannabis in the bag, knew of its nature, and by reason of its weight exceeding the statutory minimum of 200g, was a trafficker in the same.

Upon his defence being called, the appellant elected to give evidence upon oath but called no witnesses.

By way of introduction, he said that he was 39 years of age and that at the time of his arrest he was a petty trader dealing in aluminium ware, plying his trade at Pekan Sehari, Telok Murok, Kampong Gajah, Perak, ever since April 1983. He claimed that he bought his supplies from Pekan Siam because generally, they could be more cheaply had there than here.

Casting his mind back to the events of the morning of the day in question, he recalled that he had walked from Pekan Siam past the Pedestrian Check Point, carrying with him, *not* the brown travelling bag (exh P7) but a green travelling bag, into the Customs Check Point where there were a number of persons standing in the queue, including a Thai citizen named Dollah, who he knew and who had asked him where he was going. In reply, the appellant said he was going home. Dollah said that he was going to Penang. The appellant then handed over his border pass for chopping at the Immigration Office, and claimed that, soon after, as he was about to move on, Dollah handed to him the brown bag (exh P7) for checking at the Customs Check Point, saying that he had to have his border pass stamped at the Immigration Office. The appellant duly obliged and added that on arrival at the customs counter he placed both the bags, that is to say, Dollah's brown bag and his own green bag, on the inspection counter for examination by a Chinese customs officer (later identified as Customs

A Officer Lim). Upon being asked by a Malay customs officer (later identified as Customs Officer Hamzah) about the contents of the brown bag, the appellant claimed that he had disclaimed knowledge thereof, at the same time, pointing to Dollah, who he said was behind him then. The appellant added that between him and Dollah were two others standing in the queue carrying boxes and, that as he pointed at Dollah, the latter took to his heels, pursued by a few customs officers. The appellant was detained on the spot, but Dollah made good his escape — so it was said.

The appellant was insistent that at the time he was detained, he was carrying not just the brown bag as alleged by Customs Officer Hamzah, but also his own green bag and that he had neither obstructed Customs Officer C Lim from searching the brown bag nor had he attempted to flee from the scene.

Clearly, the question whether or not the appellant was carrying the two bags or just the one bag was a crucial factor having regard to the defence case, which was that he was an innocent carrier, at the behest of Dollah, of the brown bag which contained the cannabis. Upon this question, there was D in fact corroboration of the most potent kind of the appellant's version which came from the lips of Customs Officer Lim himself who had admitted, though only under cross-examination, that 'it is true that there were two bags on that day,' one being the brown bag containing the cannabis and the other a green bag which contained nothing incriminating.

E On the other hand, it will be recalled, that Customs Officer Hamzah's evidence on this point was quite the contrary, he having alleged throughout that the appellant carried only one bag, namely, the brown bag containing the cannabis.

There was thus an acute conflict of evidence upon a question of central importance in the case for the prosecution itself, giving rise to more than a F reasonable doubt as to whether the appellant carried one or two bags, the benefit of which he was plainly entitled to.

The matter did not rest there because Customs Officer Lim had also testified, under cross-examination, that he could not recall whether there were three to four persons in the queue at the counter behind the appellant G when the appellant placed the luggage on the counter. Thus, upon the evidence for the prosecution, the possibility that the man Dollah was amongst the three or four persons who stood in the queue behind the appellant could not be ruled out.

In his grounds of judgment supplied to the solicitors for the appellant some four years after the notice of appeal had been lodged, the learned H judge made no mention of the cogent fact that Customs Officer Lim had admitted, that the appellant was indeed carrying the two bags in question at the material time. We could only assume from this glaring omission, that the learned judge had failed to take into account, or give proper weight to, or draw proper inferences from, the fact that the appellant might have I carried the two bags at the material time. Had he done so, he might well have considered the appellant's explanation that he was carrying the brown bag with its offending contents at the behest of Dollah, in a more favourable light than he had done. In which case, the learned judge might also have

regarded with considerable scepticism the testimony of Customs Officers Lim and Hamzah that the appellant had obstructed the inspection of the brown bag or that he had attempted to flee from the scene.

We recognized that the learned trial judge had a great advantage, denied to this court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors v Lim Thean Tong*.[1]) An appellate court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. (See *Coghlan v Cumberland*[2] and *Bigsby v Dickinson*.[3])

In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt or Thomas v Thomas*[4]) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence. Having done so, we were amply satisfied that 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty' (per Hewart CJ in *R v Wallace*[5] applied by Thomson CJ in *Jubri v PP*[6]).

The result, therefore, was that we allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim